

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

CHARLES E. GARNER

Claimant

VS.

KITSELMAN CONSTRUCTION, LLC

Respondent

AND

AUTO OWNERS MUTUAL

Insurance Carrier

Docket No. 1,069,084

ORDER

STATEMENT OF THE CASE

Claimant requests review of the December 29, 2015, Award entered by Administrative Law Judge (ALJ) Steven Roth. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Matthew M. Hogan of Overland Park, Kansas, appeared for respondent.

The ALJ found claimant “not only failed to give notice, he actively undercut and effectively erased what might have served as a waiver of that notice requirement.”¹

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues respondent had actual knowledge of his injury at the time of the incident, thereby waiving the statutory notice requirements of K.S.A. 2013 Supp. 44-520(a). Claimant contends the ALJ erred in finding respondent's testimony credible, and further erred in holding claimant to a higher burden of proof than required by statute. Claimant argues he suffered a 19 percent permanent partial impairment of his right upper extremity as a result of the accident and is entitled to future medical treatment.

¹ ALJ Award (Dec. 29, 2015) at 9.

Respondent maintains the ALJ's Award should be affirmed. Respondent argues claimant at no time provided notice compliant with K.S.A. 2013 Supp. 44-520.

The issues for the Board's review are:

1. Did claimant provide timely notice of his claim to respondent?
2. What is the nature and extent of claimant's disability?
3. Is claimant entitled to future and unauthorized medical care?

FINDINGS OF FACT

Claimant worked for respondent for approximately 3.5 years as a construction laborer. On or about December 20, 2013, claimant, Kurt Kitselman, and another coworker were constructing a metal building in Emporia, Kansas. Claimant testified he was assisting in positioning purlins, which are metal beams weighing approximately 80 pounds and over 20 feet long, across the rafters of the structure when he felt a tear in his right shoulder. Claimant stated he felt immediate pain on the top of his shoulder. He climbed down from the roof and informed Mr. Kitselman, owner of respondent, he thought he "tore something loose in [his] shoulder."² Claimant testified:

Q. And you had just climbed down from the rafters when you told him this?

A. Yes.

Q. Did you – did he say anything back to you?

A. He said – he was on his knees, bolting something together. And he said, "I can't pay you with your arm hanging down."³

Claimant testified neither his coworker nor Mr. Kitselman witnessed the event. Claimant stated he did not tell Mr. Kitselman exactly how he hurt his shoulder because "[Mr. Kitselman] was there when [claimant] did it."⁴ Claimant stated Mr. Kitselman also

² P.H. Trans. at 11.

³ *Id.*

⁴ *Id.* at 14.

suggested that he get a desk job, or a job at McDonalds.⁵ Mr. Kitselman agreed that he, in jest, told claimant he needed to get a desk job.⁶

Mr. Kitselman disputed claimant's testimony, stating, "There was nothing that I can recall that happened that I would consider it was an injury."⁷ Mr. Kitselman explained claimant did not fall, nor did anything fall on claimant. Further, Mr. Kitselman noted complaints of general aches and pains are common in his line of work. Mr. Kitselman testified:

Q. So as far as what he specifically told you about his shoulder bothering him, you don't recall any specifics; is that right?

A. No. I remember him not being able to use his arm very well that day and I remember telling him that he might as well go home because if he can't work then why would I pay him to keep working. And [claimant] is a very tough individual and he said, no, I'm good, let's just keep going. . . . And came to work the next day and his shoulder was bothering him and worked all day long. And I remember specifically telling him that he should probably not come to work because he's basically – why would I be paying him if he can't do the work that he's needing to do or because he was up high, I don't need that type of situation to where he falls because he can't hold himself right or whatever.⁸

Mr. Kitselman later testified he was aware claimant's shoulder was bothering him, and claimant "couldn't lift his arm up past 90 degrees at one point."⁹ Mr. Kitselman also stated claimant never mentioned the shoulder condition was work-related, and he was unaware of claimant's shoulder condition until he received a copy of the Application for Hearing filed March 19, 2014.

Claimant stated Mr. Kitselman visited him at his home following the receipt of the Application for Hearing. Claimant indicated Mr. Kitselman said, during their conversation, that respondent would pay for workers compensation. Claimant testified he was not aware he was not receiving compensation until he contacted his attorney.

Mr. Kitselman agreed with claimant insofar as he did visit claimant's home. Mr. Kitselman described the encounter:

⁵ See *id.* at 16.

⁶ See *id.* at 60.

⁷ Kitselman Depo. at 22.

⁸ *Id.* at 23-24.

⁹ P.H. Trans. at 73.

I just got my papers in the mail after work that day. So I drove specifically over to [claimant's] house that evening because I thought it was over his back. I had no clue it was over his shoulder. . . . So I had no clue he was even going that route with his shoulder. And the reason being is because I didn't even realize his shoulder was injured because of – or allegedly because of our work.¹⁰

The original Application for Hearing, filed March 19, 2014, alleged an accident date on or about November 14, 2013, in which claimant injured his right shoulder. Claimant testified he originally believed the incident occurred in November 2013; however, respondent noted the job in question occurred near the end of December 2013. Claimant testified:

Q. At that point in time what date did you think this happened? Somewhere in November. Is that right?

A. When we took – yeah. Yes. I, me and my wife both thought it was in November when I got hurt.

. . . .

Q. But you're here today and you think that it was December 20th?

A. Mr. Kitselman came to my house and we talked about it. And he said, no, [the job] was in December. And he got his records, so that's why I went with that.¹¹

Claimant testified his family doctor referred him to Dr. Edward Letourneau for joint pain. On November 20, 2013, Dr. Letourneau examined and obtained x-rays of claimant's right shoulder, noting claimant appeared to have a fair amount of mechanical shoulder pain. Dr. Letourneau recorded claimant's history of right shoulder difficulties resulting in surgery in 1995, and the x-rays revealed a widening of the acromioclavicular joint consistent with past surgery. Dr. Letourneau indicated claimant had osteoarthritis with no evidence of inflammatory disease and provided injections to both of claimant's shoulders.

Claimant testified he had no problems with his right shoulder from the time of his 1995 surgery to the time of the 2013 accident. He stated the injections provided by Dr. Letourneau provided pain relief in his shoulders for approximately two weeks before his pain returned. Claimant explained he continued to work for respondent although his pain worsened over time.

¹⁰ *Id.* at 69.

¹¹ *Id.* at 43-44.

Mr. Kitselman stated claimant fully used his right shoulder following the injections. Mr. Kitselman said he believed claimant received the injections subsequent to January 1, 2014. He testified:

Q. Okay. Do you recall when he got a shot in his shoulder? Does that ring a bell?

A. I do remember that.

Q. Did that relieve his condition for awhile?

A. It did.

Q. Okay. And then did he begin doing more activities at work?

A. He did. And I can't remember exactly when he got that Cortizone [*sic*] shot but it was pretty – I mean, it was within maybe a week, maybe a week and a half of him complaining about his arm.¹²

Claimant continued to work for respondent until February 28, 2014, when he was hospitalized regarding his back. Claimant testified he has “a bad back” and it “just goes out.”¹³ Claimant explained his back went out while he was at home, and he was transferred to the hospital where he remained for four days. Claimant did not return to work at respondent following his hospitalization. Claimant testified he did not recall informing Mr. Kitselman he would not return to work because of his back problems. Mr. Kitselman testified:

Q. Okay. The last date [claimant] did affiliate with you or work for you or come over to wherever you were working, did he leave the job and say I'm not coming back or did you tell him not to come back or how did the relationship end, if it did?

A. If I remember right, there was weather so we didn't work maybe on a Friday, so he might have worked on a Thursday. We didn't work on a Friday because of the weather. And then I think he hurt his back on a Saturday and went to the hospital for a week. And then couple weeks later I get a letter from you.¹⁴

Dr. Daniel Zimmerman examined claimant on April 3, 2014, at claimant's counsel's request. Claimant's chief complaint was his right shoulder injury. Dr. Zimmerman reviewed claimant's medical records and history, which included an accident date of

¹² *Id.* at 65-66.

¹³ *Id.* at 49.

¹⁴ Kitselman Depo. at 20.

“shortly before Thanksgiving 2013.”¹⁵ After performing a physical examination, Dr. Zimmerman noted claimant required “further medical attention for the right shoulder rotator cuff tear that [he believes] is present at this time,” and claimant had not reached maximum medical improvement.¹⁶ Dr. Zimmerman recommended claimant obtain an MRI of the right shoulder, treat his pain and discomfort with applied heat and over-the-counter ibuprofen, and imposed physical restrictions. Dr. Zimmerman opined:

The prevailing factor for the right shoulder rotator cuff tear is the accident that occurred around Thanksgiving of 2013 when carrying out job duties in his employment for [respondent].¹⁷

Court-authorized orthopedic surgeon Dr. Charles Craig Satterlee first examined claimant on September 4, 2014. Dr. Satterlee examined claimant’s right shoulder and determined surgery was appropriate, noting the work-related incident was the prevailing factor necessitating treatment.¹⁸ He performed a right shoulder rotator cuff repair with an arthroscopic subacromial decompression and a distal clavicle excision on October 31, 2014. Claimant underwent a postoperative course of medication and physical therapy before Dr. Satterlee found him to be at maximum medical improvement (MMI) on March 30, 2015. Dr. Satterlee provided permanent restrictions of no lifting over 10 pounds below horizontal and no carrying over 20 pounds with the right arm. Dr. Satterlee did not believe claimant was in need of additional treatment.

Claimant returned to Dr. Zimmerman on April 30, 2015. Dr. Zimmerman reviewed claimant’s updated medical records, including those from the October 2014 surgery. Claimant continued to complain of pain and weakness in his right shoulder. Dr. Zimmerman agreed claimant had reached MMI but indicated claimant would require additional medical treatment in the form of nonsteroidal anti-inflammatory medications and/or injections. Dr. Zimmerman imposed the following restrictions:

Using the right upper extremity, he is capable of lifting 50 pounds on an occasional basis and 25 pounds on a frequent basis. He should avoid work activity at shoulder height or above on the right side He should avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering, handling, holding, and reaching activities using the right upper extremity as such activities would be likely to increase the pain and discomfort affecting the right shoulder.¹⁹

¹⁵ Zimmerman Depo., Ex. 2 at 3.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ See Satterlee Depo., Ex. 2 at 3.

¹⁹ Zimmerman Depo., Ex. 3 at 5.

Using the *AMA Guides*,²⁰ Dr. Zimmerman determined claimant sustained a total 29 percent impairment to the right upper extremity at the level of the shoulder, with 19 percent allocated to the work-related incident of December 20, 2013. Dr. Zimmerman testified he based his rating on claimant's range of motion, pain, discomfort, and weakness.

On June 10, 2015, Dr. Satterlee determined claimant sustained a seven percent impairment of the right upper extremity based on the *AMA Guides*. Dr. Satterlee testified he based the rating on claimant's range of motion, which he personally measured.

Claimant has not worked since February 2014.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

²⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2013 Supp. 44-508(f)(1) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

ANALYSIS

The notice issue comes down to credibility. The only ALJ who witnessed all the parties testify was ALJ Avery. ALJ Avery believed claimant to be more credible than respondent. The Board generally gives deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony.

The purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.²¹ Claimant testified that, about five minutes after his injury by accident, he climbed down from the ladder and told Mr. Kitselman he thought he tore something loose in his shoulder. Claimant's uncontradicted statement essentially included the time of the injury (a few minutes ago), the date of the injury (today), the place of the injury (on the roof), the person injured (claimant), and particulars of such injury (tore something in the shoulder). Mr. Kitselman responded to claimant's statement by telling claimant he could not pay him with his arm hanging down and that he should think about getting a desk job. Claimant's statement to his employer, while not articulately presented, contains the elements required to provide notice of an injury and afforded the employer an opportunity to investigate the claim, provide medical treatment and prepare a defense.

Mr. Kitselman acknowledged claimant told him on the date of the accident that he was having a problem with this right shoulder.²² He testified he told claimant he needed to find a desk job. Mr. Kitselman stated he did not think claimant suffered an accident because "he didn't fall."²³ Mr. Kitselman testified he observed claimant could not lift his arms over 90 degrees and that claimant would grimace in pain when he tried to lift his arm.²⁴ When asked about the specific statements claimant made when he came down from the ladder, Mr. Kitselman stated he could not remember "how it went down."²⁵ It is evident from Mr. Kitselman's testimony that his recollection of events was vague, and he had little understanding of what an accident is under the Kansas Workers Compensation Act. Mr. Kitselman's testimony is equivocal, at best.

Claimant's case should not be denied because respondent's representative lacked the skills to interpret information given to him relating to a work-related injury by accident.

CONCLUSION

Claimant has met the burden of proving he provided respondent with timely notice of an injury as required by K.S.A. 2013 Supp. 44-520.

²¹ See *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

²² See P.H. Trans. at 59-60.

²³ *Id.* at 61.

²⁴ See *id.* at 62.

²⁵ *Id.* at 63.

AWARD

WHEREFORE, it is the finding, decision and order of this Board Member that the Award of Administrative Law Judge Steven Roth dated December 29, 2015, is reversed and remanded for a determination of the nature and extent of claimant's disability and other issues not included in this Order.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Hon. Steven Roth, Administrative Law Judge